Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

October Term, 1996

Lionel Alfred Weaver,

Petitioner, pro se

v.

Denise Lee Weaver

On Petition for Writ of Certiorari
To The Court of Appeals of the State of Kansas

PETITION FOR WRIT OF CERTIORARI

Lionel Alfred Weaver
Post Office Box 9317
Mission, Kansas 66201
913-831-1800

60 pp

At the very end of this trial the respondents attorney thanked the judge for calling him at night while he was working on these things, and that he and his client appreciate it. At that point the petitioner contends that the state judge was required by the United States Constitution to recuse himself.

#1 Are the Kansas Statutes and or Judicial Canons regarding judicial recusal unconstitutional ?

#2 Are the opinions of the Kansas Appellated Courts regarding 28USC Sec.455(a) in conflict with the Supreme Court of the United States, Federal and State Courts ?

#3 Does 28 United States Code Section 455(a) apply to state judges literally and or through the supremacy clause ?

#4 By not recusing himself, did the state judge violate Article VI(2) of the United States Constitution ?

#5 When the state judge did not recuse himself did that deny the petitioner due process as written in amendment XIV Section 1 of the United States Constitution ?

#6 Did the ruling of res judicatta by the Court of Appeals of Kansas regarding a federal issue that had never been raised before deny due process as written in amendment XIV Section 1 of the United States Constitution ?

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28 U. S. C. Section 455(a) on pages (ix), 3, 6 and 10

OPINIONS AND ORDERS

No. 70,810 In the Court of Appeals of the State of Kansas

No. 93-70810-AS In the Supreme Court of the State of Kansas

No. 74,377 In the Court of Appeals of the State of Kansas

No. 95-74377-AS In the Supreme Court of the State of Kansas

JURISDICTION

On Sept. 20, 1996 The Court of Appeals of the State of Kansas decided this case and a copy of its opinion appears at Appendix A

On Nov. 8th, 1996 The Supreme Court of the State of Kansas denied review and its order appears at Appendix D

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257(a).

28 U. S. C. Sec. 2403(b) may apply and shall be served on the Attorney General of Kansas.

Constitutional Provisions, Federal and State Statutes

28 United States Code Section 455(a)

Disqualification of justice, judge or magistrate

(a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might be reasonably questioned.

Kansas Statutes Annontated 20-311(d)

Change of judge; procedure; grounds.

(a) If a party or a party's attorney believes that the judge to whom an action is assigned cannot afford that party a fair trial in the action, the party or attorney may file a motion for change of judge. The motion shall not state the grounds for the party's or attorney's belief. The judge shall promptly hear the motion informally upon reasonable notice to all parties who have appeared in the case. If the judge disqualifies the judge's self, the action shall be assigned to another judge by the administrative judge. If the judge refuses to disqualify the judge's self, the party seeking a change of judge may file the affidavit provided for in the subsection (b). If an affidavit is to be filed it shall be filed forthwith.

(b) If a party or a party's attonrey files an affidavit alleging any of the grounds specified in subsection (c), the administrative judge shall at once determine, or refer the affidavit to another district judge for prompt determination of, the legal sufficiency of the affidavit. If the affidavit is filed in a district court in which there is no other judge who is qualified to hear the matter, the administrative judge shall at once notify the departmental justice for the district and request the appointment of another district judge to determine the legal sufficiency of the affidavit. If the affidavit is found to be legally sufficeint, the case shall be assigned to another judge.

(c) Grounds which may be alleged as provided in subsection (b) for change of judge are that:

(1) The judge has been engaged as counsel in the action prior to the appointment or election as judge.

(2) The judge is otherwise interested in the action.

(3) The judge is related to either party to the action.

(4) The judge is a material witness in the action.

(5) The party or the party's attorney filing the affidavit has cause to believe and does believe that on account of the personal bias, prejudice or interest of the judge such party cannot obtain a fair and impartial trial or fair and impartial enforcement of post-judgment remedies. Such affidavit shall state the facts and the reasons for the belief that bias, prejudice or an interest exists.

(d) In any affidavit filed pusuant to this section, the recital of previous rulings or decisions by the judge on legal issues or concerning the legal sufficiency of any prior judicial proceeeding, or filed by such counsel's law firm, pursuant to this section, shall not be deemed legally sufficient for any belief that bias or prejudice exists.

Kansas Canons 1993 Ct. R. Annot. Rule 601 Canon 3.C.(1).

C. Disqualification.

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of the disputed evidentiary facts concerning the proceeding;

(b) he seved as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a

material witness concerning it;

(c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding;

United States Constitution Article VI (2)

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Constitution Ammendment XIV Section 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of th the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive

any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdicition the equal protection of the laws.

STATEMENT OF THE CASE

This case has been through the Court of Appeals of the State of Kansas twice, in *Weaver I,* the petitioner asked the Court of Appeals of the State of Kansas how he could get a fair trial with the judge calling the opposing attorney at night ? The Court of Appeals did not find thisimproper, however the Court of Appeals did reverse a child support issue. The petitioner, then petitioned the Supreme Court of Kansas and asked if this was a violation of due process of the 14th Ammendment of the U. S. Constitution ? Review was denied. The petitioner appealed the district court again, on the child support issue and in *Weaver II,* in front of the Court of Appeals, for the first time the petitioner raised the issue of the Kansas recusal statutes being unconstitutional and denying the petitioner the federal standard of judicial impartiality, also the petitoner said that the state judge violated 28 U.S.C. Sec. 455(a). The Court of Appeals ruled *res judicata.* The petitioner petitioned the Supreme Court of Kansas and review was denied.

ARGUMENT

This case before this Court should be heard to determine whether the people of Kansas and 44 other states have a right to the federal standard of judicial impartiality in their state courts. Residents of Iowa, Hawaii, Florida, Connecticut and Missouri enoy the federal standard of judicial impartiality while Kansas residents do not, and the other 44 states need to be directed.

This case should be heard by this Court because a fair tribunal is a fundamental right of our judicial system.

Quoting Mr. Justice Frankfurter.

> "The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." (emphasis supplied) *Anti-Fascist Committee v. McGrath,* 341 U. S. 123, 170 (1950)

> "Therefore, justice must satisfy the appearance of justice." *Offutt v. United States,* 348 U. S. 11,14 (1954)

Quoting Mr. Justice McKenna.

> "but we may say, that its solicitude is that the tribunals of the country shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial, free, to use the words of the section, from any "bias or prejudice" that might disturb the normal course of impartial judgment." *Berger et al v. United States,* 255 U. S. 22, 35, 36 (1920)

Unless it is normal for this judge to call every attorney at night, the petitioner contends that this working relationship might disturb the normal course of impartial judgment.

Quoting Mr. Justice Black.

> "A fair trial in a fair tribunal is a basic requirement

of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." *Re Murchinson,* 349 U. S. 133, 136 (1954)

"This rule of arbitration and this canon of judicial ethics rest on the premise that any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Continental Casualty Co.,* 393 U. S. 145, 150 (1968)

Question # 1

Are the Kansas Statutes and or Judicial Canons regarding judicial recusal unconstitutional?

The statutes of Kansas do not give the petitioner nor other Kansan's the federal standard of judicial impartiality that the Constitution of the United States provides to its citizens, the fact that the respondents attorney thanked the judge for the calls he had received at night gives the impression of an unlevel playing field, this qualifies as providing a reasonable doubt concerning the impartiality of the judge. By federal law the judge had to recuse himself, Kansas however does not have any self enforcing recusal statutes , and the Kansas Judicial Canons give the judge an option with the word "should" where as the federal statutes are mandatory with the word "shall".

"Congress saw fit to change the words "a judge *should* disqualify himself in a proceeding in which his impartiality might reasonably be questioned "to" a judge *shall* disqualify himself in a proceeding in which his

impartiality might reasonably be questioned," *Parrish v. Board of Com'rs of Alabama State Bar,* 524 F.2d 98 (1975)

"Congress, in amending the statutory provision for the disqualification of judges, adopted the language proposed in the American Bar Association's Canons for Judicial Conduct 3 C(1) with the exception of making the disqualification mandatory by subsituting the "shall" for the ABA's "should". *Fredonia Broadcasting Corp., Inc. v. RCA Corp.* 569 F. 2d 251, 256-257 (1978)

28 U.S.C. Section 455(a) is written as follows.

"Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might be reasonably questioned."

28 U. S. C. Section 455(a) is self enforcing. Quoting opinions from the United States Court of Appeals, Fifth Circuit.

"The legislative history of the amendment to Sec. 455 indicates that Congress' purpose was to adopt a categorical rule that would be self-enforcing." *McCuin v. Texas Power & Light Co.,* 714 F.2d 1255,1259 (1983)

"In contrast, Sec. 455(a) is automatic, mandatory and self-executing. The adoption of ABA Canon 3 C was a response to criticism of the inadequacy of the Sec. 144 approach. It did away with the "duty to sit doctrine. It attacks the appearance of bias, not just bias in fact." *U. S. v. Chantal,* 902 F.2d 1018, 1023 (1990)

The Kansas Statutes K.S.A. 20-311(d) are not self-

executing, it requires a motion of a party, [see page (ix-x)] however the Kansas Canons (which are not construed) 1993 Kan. Ct R. Annot. Rule 601 Canon 3.C.(1) are written as follows.[see page (x-xi)]

"A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, "

Quoting Mr. Justice Washington wrote.

> "This question does not so much involve a contest for power between the two governments, as the rights and privileges of the citizen, secured to him by the constitution of the United States, the benefit of which he may lawfully claim." *Houston v. Moore,* 5 Wheaton 22 (1820)

The petitioner has the right to a fair and impartial trial that meets federal standards of judicial impartiality. Mr. Chief Justice Burger issued the following defining opinion.

> "We underscore that our decision today undertakes to answer only the question of under what circumstances the Constitution requires disqualifications. Congress and the states of course, remain free to impose more rigorous standards for judicial disqualificaton than those we find mandated here today. *Aetna Life Insurance v. Lavoie,* 475 U. S. 813,828 (1985)

Obviously Kansas has not imposed more rigorous standards and thereby the lack of a self enforcing recusal statute is unconstitutional. The judicial canons that give a judge the option with the word should rather than shall are unconstitutional. Kansas does have a procedure for changing a judge through the use of an affidavit that is in K. S. A. 20-311d., the statute however does not have anything to say about self enforc-

ing recusal thereby K. S. A. 20-311d. is also unconstitutional because its standards are less rigorous than the federal standards.

Quoting this Court. "Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument." *Marbury v. Madison,* 5 U. S. 137, 180 (1801)

Question # 2

Are the opinions of the Kansas Appellate Courts regarding 28 U.S.C. Sec. 455 (a) in conflict with the Supreme Court of the United States, Federal Courts and State Courts ?

The Appellate Courts of Kansas defiantly proclaim that federal law concerning judicial impartiality standards are not binding on them.

Quoting Mr. Justice Abbott of the Court of Appeals of Kansas, "Although the acts described in this paragraph are not binding in Kansas" *State v. Logan,* 9 Kan. App. 353,357,358, 678 P.2d 181. Mr. Justice Abbott then proceeds to discuss 28 U.S.C. Sec. 455(a) and federal cases for the next page and a half. This proclamation of "not binding" was also stated by the court of appeals of the state of Virginia,

> "The court is unanimously of opinion that the appellate power of the supreme court of the United States does not extend to this court under a sound construction of the constitution of the United States; that so much of the 25th section of the act of congress, to establish the judicial courts of the United States, as extends the appellate jurisdiction of the supreme court to this court, is not in pursuance of the constitution of the United States. That the writ of error in this cause was

improvidently allowed under the authority of that act; that the proceedings thereon in the supreme court were *coram non judice* in relation to this court, and that obedience to its mandate be declined by the court." *Martin v. Hunter's Lessee.* 14 U.S. 304,305,306 (1816)

The Court of Appeals of Kansas "not binding" interpretation is in direct conflict with an opinion issued by the United States Court of Appeals, Tenth Circuit. Quoting Mr. Justice McWilliams, Mr. Justice Breitenstein and Mr. Justice Doyle.

"Section 455 (a) is broader. It applied to any judge and includes that he "shall disqualify himself in any proceeding in which his impartiality might be reasonably questioned." (emphasis supplied)*United States v. Ritter,* 540 F.2d 459 (1976)

The Court of Appeals of Kansas is also in conflict with the Supreme Court of the United States.

Quoting Mr. Justice Scalia, as he indicated that 28 U.S.C. Sec. 455 (a) applies to all judges in delivering the following opinion.

"But the other two paragraphs of the revision brought into Sec. 455 elements of general "bias and prejudice" recusal that had previously been addressed only by Sec. 144 ("bias or prejudice"), but (1) made them applicable to *all* justices, judges, and magistrates (and not just district judges)."*Liteky v. U. S.,* 114 S. Ct. 1147,1153 (1994)

Quoting from *Liteky,* Mr. Justice Kennedy, with whom Justice Blackmun, Justice Stevens and Justice Souter join, concurring in the judgment.

"If through obduracy, honest mistake, or simple inability to attain self-knowledge the judge fails to

acknowledge a disqualifying predisposition or circumstance, an appellate court must order recusal no matter what the source. As I noted above, the central inquiry under Sec. 455(a) is the appearance of partiality, not its place of origin." (emphasis supplied) *Id.* at 1161

Mr. Justice Blackmun refers to 28 U. S. C. Sec. 455(a) involving a state case.

"California requires that a judge disqualify himself if "a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." Cal. Civ. Proc. Code. Ann. Sec. 170.1(a)(6)(C)(West Supp. 1990). See 28 U. S. C. Sec. 455(a), which similarly proscribes the participation by a judge of the United States " in any proceeding in which his impartiality might reasonably be questioned." Knowledge of the disqualifying circumstance is not an element of either statute." (emphasis supplied) *Robertson v. California,* 498 U.S. 1004, 1006 (1990)

In the Supreme Court of the State of Kansas its acceptable to have a father be a judge hearing criminal cases in the same county that his son is an assitant prosecuting attorney. Kansas raises its state colors above the "Law of the Land" in the *Logan* cases when Mr. Justice Swinehart of the Court of Appeals of Kansas says its ok this time however we recommend that Judge Ballinger not participate in a criminal case while his son is an assistant prosecuting attorney. Quoting Mr. Justice Swinehart.

" However, to eliminate this question being raised in future proceedings, we would deem it appropriate for Judge Ballinger to recuse himself from cases pending

before him which the district attorney's office is prosecuting while his son is employed on its staff." *State v. Logan,* 9 Kan App. 353, 355.

Then the Kansas Supreme Court Chief Justice Schroeder writing for the court strikes down this recommendation and says its ok to have a father as judge and his son employed as an assistant prosecuting attorney.

> "For these reasons, we find that the Court of Appeals was incorrect in advising Judge Ballinger to recuse himself from cases pending before him which the district attorney's office is prosecuting while his son is employed on its staff." *State v. Logan,* 236 Kan. 78,88 (1984)

Clearly the Appellate and Supreme Courts of Kansas has no intention of being bound by the supreme "Law of the Land" when it comes to judicial impartiality. You may send in federal troops any time now, the petitioner recommends the spring, as the weather is best and the farmers are in the field.

It is important for this Court to hear this case to notify Kansas Courts that the United States Constitution does apply to them concerning judicial impartiality and that federal statutes are laws passed by congress and all judges in every state are bound thereby.

As this Court said. "No state legislator or excutive or judicial officer can war against the Constitution without violating his undertaking oath to support it."*Cooper v. Aaron* , 358 U. S. 1, 18 (1958)

It is also important for this Court to hear this case because some states (not Kansas of course) are acting under the

supremacy clause of the Constitution of the United States regarding judicial impartiality, they are following the "Law of the Land", however they don't have to according to the Supreme Court of Kansas, these other states could also have a parent and child executing justice as judge and prosecutor, developing "all in the family" judicial systems, they can also have judges working on things with one attorney over the phone at night, what wonderful working relationships this must create.

The states that are acting under the supremacy clause regarding this matter are the following. Iowa, *State v. Mann*,512 NW 2nd 528 (1994); Hawaii, *Yorita v. Okumoto,* 643 P 2nd 820 (1982); Florida, *Department of Revenue v. Golder,* 322 S 2nd 1 (1975); Connecticut,*Petrowski v. Norwich Free Academy,* 481 A 2nd 1096 (1984); Missouri, *Berry v. Berry,* 654 SW 2nd 155 (1983)

It is important for this case to be heard to determine if Kansas is correct or Iowa, Hawaii, Florida, Connecticut and Missouri . Then the other 44 states can follow the this Courts ruling.

Question #3

Does 28 United States Code Section 455 (a) apply to state judges literally and or through the supremacy clause of the United States Constitution ?

Beginning with a literal perspective first.

The preamble of the United States Constitution begans "We the People of the United States,". One hundred and eighty four years later congress passes 28 U. S. C. Sec. 455(a) that reads "Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality

might be reasonably questioned." Has the term "of the United States" been translated from meaning "of the United States" to "of the United States Government "? If congress had intended 28 U. S. C. Sec. 455(a) to only apply to federal judges why didn't they write "of the United States Government" or "Any federal justice, judge or magistrate of the United States" ? 28 U.S.C. Sec. 455(a) is a law passed by congress and it literally states "Any justice, judge or magistrate of the United States" the United States Constitution reads.

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *United States Constitution,* Article VI(2)

The petitioner has read that Mr. Chief Justice Marshall has a pretty good understanding of the United States Constitution, let's see what he says.

> "As men whose intentions require no concealment, generally employ the word which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said." *Gibbons v. Ogden,* 9 Wheaton 1,5 (1824)

The state judge in the case before the Court is a judge of the United States, not of the United States Government, but he is still a judge of the United States. He is a state judge of Kansas

of which has been a member of the United States since 1861.

When considering this particular federal statute, one must measure the importance of impartiality as Mr. Justice Marshall does.

> "But the strict requirments of neutrality cannot be the same for administrative prosecutors as for judges, whose duty it is to make the final decision and whose imparitaltiy serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime. " *Marshall v. Jerrico, Inc.* 446 U. S. 238, 250 (1979)

Mr. Justice Story specifically addresses Article VI of the United States Constitution in the following paragraphs.

> "But is is plain that the framers of the constitution did contemplate that cases within judicial cognizance of the United States not only might but would arise in the state courts, in the exercise of there ordinary jurisdiction. With this view the sixth article declares, that "this constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary not withstanding." It is obvious that this obligation is imperative upon the state judges in the official, and not merely in their private, capacities. From the very nature of their judicial duties they would be called upon to pronounce the law applicable to the case in judgement. They were not to decide merely according to the laws or constitution of the state, but according to the constitution, laws

and treaties of the United States---" the supreme law of the land." (emphasis supplied) *Martin v. Hunter's Lessee,* 14 U. S. 304, 340,341(1816)

"Nor can such a right be deemed to impair the independence of state judges. It is assuming the very ground in controversy to assert that they possess an absolute independence of the United States. In respect to the power granted to the United States, they are not independent; they are expressly bound to obedience by the letter of the constitution;" (emphasis supplied) *Id* at 344

The petitioner believes that Mr. Chief Justice Marshall and Mr. Justice Story would agree that this federal statute literally applies to state judges.

Now we will consider if federal statute 28 U. S. C. Sec. 455(a) applies to state judges through the Supremacy Clause.

The judge violated the United States Constitution because the judge's lack of action is contrary to a law passed by congress, the judge denied the petitioner to his United States Constitutional right to a trial that meets the federal standard of judicial impartiality. As Mr. Chief Justice Marshall wrote.

"The great principle is, that the constitution and the laws made in pursuance thereof are supreme ; that they control the constitution and laws of the respective States, and cannot be controlled by them" *McCulloch v. Maryland,* 4 Wheat 316, 426 (1819)

"Since, however in exercising the power of regulating their own purely internal affairs, whether of trading or police, the States may sometimes inact laws,

the validity of which depends on their interfering with, and being contrary to, an act of congress passed in pursuance of the constitution, the court will enter upon the inquiry, whether the laws of New York, as expounded by the highest tribunal of that State, have, in their application to this case, come into collusion with an act of congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power "to regulate commerce with foreign nations and among the several states," or, in virtue of a power to regulate their domestic trade and police. In one case and the other, the acts of New York must yield to the law of congress and the decision sustaining the privilege they confer, against a right given by a law of the Union, must be erroneous.

This opinion has been frequently expressed in this court, and is founded as well on the nature of the government as on the words of the constitution. In argument, however, it has been contended that, if a law passed by a State, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by congress in pursuance of the constitution, they affect the subject, and each other, like equal opposing powers.

But the framers of our constitution foresaw this state of things, and provided for it by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act inconsistent with the constitution, is produced by the declaration that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the

state legislatures as do not transcend their powers, interfere with, or are contrary to the laws of congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case, the act of congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.". (emphasis supplied) *Gibbons v. Ogden,* 9 Wheaton 1, 16,17(1824)

Mr. Justice Harlan wrote regarding the supreme law of the land.

"So, that a State court of original jurisdiction, having the parties before it, may, consistently with existing Federal legislation, determine cases at law or in equity, arising under the Constitution or laws of the United States, or involving rights dependent upon such Constitution or laws. Upon the State courts, equally with the courts of the Union, rest the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pusuance thereof, whenever those rights are involved in any suit or proceeding before them; for the judges of the State courts are required to take an oath to support that Constitution, and they are bound by it, and the laws of the United States made in pursuance thereof, and all treaties made under their authority, as the supreme law of the land, "anything in the Constitution or laws of any State to the contraty not withstanding." If they fail therin, and withhold or deny rights, privileges, or immunities secured by the Constitution and laws of the United States, the party aggrieved may bring from the highest court of the State in which the question could be decided

to this court for final and conclusive determination." (emphasis supplied) *Robb v. Connolly,* 111 U. S. 624, 637(1883)

The petitioner is convinced that 28 United States Code Sec. 455(a) does apply to state judges through the supremacy clause, he prays this Court is also.

Question # 4

By not recusing himself, did the state judge violate Article VI(2) of the United States Constitution ?

The state judge was required by federal law 28 U. S. C. Sec. 455 (a) to recuse himself, by not doing so he also violated the United States Constitution.

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *United States Constitution,* Article VI(2)

The same arguments regarding if 28 U. S. C. applies to state judges applies to this question, the judge literally and through the supremacy clause violated the United States Constitution. Quoting Mr. Justice Frankfurter

> "The duty to abstain from resistance to "the supreme Law of the Land." U. S. Const. Art. VI. 2, as declared by the organ of our Government for ascertaining it, does not require immediate approval of it nor does it deny the right of dissent. Criticism need not be stilled.

Active obstruction or defiance is barred." (emphasis supplied) *Cooper v. Aaron,* 358 U.S. 1,24 (1958) Quoting this Court.

"From these, and many other selections which might be made, it is apparent, the the framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it ? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support !

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words, " I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as _____according to the best of my abilities and understanding, agreeably to *the constitution*, and laws of the Unites States." *Marbury v. Madison,* 5 U. S. 137,179,180 (1801)

Question 5

When the state judge did not recuse himself did that deny the petitioner due process as written in amendment XIV Section 1 of the United States Constitution ?

The same arguments regarding if 28 U. S. C. Sec. 455(a) and did the state judge violate the United States Constitution apply to this question, as well as the following.

With the respondents attorney receiving phone calls from the judge at night, this could give the edge to the respon-

dent and this violates due process.

Quoting this Court.

> "The limit of the full control which the State has in the proceedings of its courts, both in civil and criminal cases, is subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution." *West v. Louisiana,* 194 U. S. 258, 263

The state courts procedure of calling the respondents attorney at night is a proceding that violates a fundamental right and by not recusing himself the judge actions are in conflict with federal law and thereby the Federal Constitution.

Quoting Mr. Chief Justice Taft.

> "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the later due process of law." *Tumey v. Ohio,* 273 U. S. 510, 532 (1926)

Quoting Mr. Justice Moody.

> "The question before us is the meaning of a constitutional provision which forbids the States to deny to any person due process of law. In the decision of this question we have the authority to take into account only those fundamental rights which are expressed in that provision, not the rights fundamental in citizenship, state or National, for they are secured, otherwise, but the rights fundamental in due process, and therefore an essential part of it. We have to consider whether the

right is so fundamental in due process that a refusal of the right is a denial of due process." *Twining v. New Jersey,* 211 U. S. 78, 107 (1908)

The petitioner believes that the state judge denied him due process by calling the respondents attorney at night.

Question #6

Did the ruling of res judicata by the Court of Appeals of Kansas regarding a federal issue that had never been raised before deny due process as written in amendment XIV Section 1 of the United States Constitution ?

What is due process ?

Quoting Mr. Justice Frankfurter.

> The requirement of "due process" is not a fair-weather or timid assurance. It must be respected in periods of calm and in times of trouble; it protects aliens as well as citizens. But "due process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of

adjustment inescapably the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process." *Anti-Fascist Committee v. McGrath,* 341 U. S. 123, 162,163 (1950)

The petitioner does not have that "just" feeling, the feeling the has is of abandonment by the Kansas Courts, are they so self righteous to believe that Kansas Judges are above the United States Constitution ?

The *res judicata* ruling of the Court of Appeals of Kansas is wrong and thereby violates the due process clause of the Ammendment XIV Section 1 of the United States Constitution. The petitioner will now explain the history of this case.

This is a divorce case that lasted nine months, on the second and last day of trial on August 13, 1993 at the very end of the proceedings the following was recorded by the court reporter. Mr. Martin is the respondents attorney.

THE COURT: It's going to be pretty soon.

MR. MARTIN: Okay, thank you.

THE COURT: Although the only time I've got to work on motions is at night. I'm set all day long every day.

MR. MARTIN: And I do know that you work at night on these things and we appreciate it. I've received phone calls from you as you were working at 10:00 o'clock at night on things. Thank You, Your Honor. And thank you for your patience.

THE COURT: I'll do my best. Thank You.

This is a very cozy working relationship these two have, so cozy the attorney can thank the judge on the record for calling him at night on these things and adds that he and his client appreciate it !!! The petitioner appealed.

In *Weaver I,* the petitioner did ask the Court of Appeals

of Kansas how he could get a fair trial with the judge calling the opposing attorney at night (see appendix F), the Court of Appeals denied relief on that issue, however the petitoner did win on one issue and that was the determination of child support. No federal constitutional issues were presented or heard. (see appendix B)

The petitioner then petitioned the Supreme Court of Kansas to review the Court of Appeals decision and he asked them to "reflect upon the Section 1 of the 14th Ammendment of the United States Constitution as if this were you're divorce and the Trial Judge had been calling the opposing attorney and had believed testimony about you that hadn't occured in court !! How in the world could this be due process or equal protection of the laws?"(see appendix G) They denied review, no federal statutes were presented. (see appendix C)

At the district court on remand in front of the original judge, the petitoner asked the trial judge for a mistrial because the opposing attorney had thanked the judge for calling him at night, the petitioner expressed to the trial judge that he wasn't certain that he had the same opportunity to present his case as his opponent, also he wanted a mistrial because the judge had agreed with untrue damaging testimony that never took place in the courtroom. (Perhaps they discussed it at night on the phone, the petitioner wanted to say this to the judge, however the judge had previously ordered the him to pay $5,432 cash per month maintenance on a fictional $6,250 gross monthly salary, and then sentenced him to 30 days in the county jail for contempt of court because he could not pay this fantasized amount and he also refused to sign away his property.) The trial judge denied his motion for a mistrial and in the petitioners opinion the trial judge did not do what the Court of Appeals instructed him to do.

In *Weaver II,* the petitioner appealed to the Court of Appeals of Kansas the judge's decision regarding the child support and raised for the first time the federal constitutional issue of the Kansas Statutes being in conflict with 28 U. S. C. Sec. 455(a) and thereby the United States Constitution the petitioner also said that the judge violated this federal law. (see appendix E) The Court of Appeals of Kansas ruled *res judicata* !! (see appendix A) The petitioner disagrees, until he started researching the 2nd appeal his understanding of U.S.C. was the the University of Southern California.

The point of the Kansas statute versus the federal statute was not raised in the first appeal, this can be considered and determined when presented on the second appeal. Quoting Mr. Chief Justice Johnston.

> "While the testimony is the same as on the former appeal, the findings in the last trial are more specific in regard to the fact that the freight depot was open for business on the day of the demand and as to the refusal of the demand." *Henry v. Railway Co.* 83 Kan 104,109 (1910)

In this case before this Court, the transcripts on the record are the same as on the former appeal, but findings are more specific that a violation of a federal statute had occured which had not been presented before to the Court of Appeals of the State of Kansas.(compare appendix E with appendixes F and G)

How does the Supreme Court of Kansas define *res judicata*?

> "We are still of opinion that an order made pursuant to the section named, which confines the action of the court to the mere granting or refusing the order

asked, without giving it power to modify, is not such a judgment as to be pleadable as *res judicata,* especially where the plea is interposed in a separate action, and where it is proposed to show such fraud in the proceedings upon which the former adjudication was founded, as would avoid it.

To make a matter *res judicata* there must be a concurrence of, first identity in the subject matter; second, in the cause of action, third of the persons and parties; and fourth in the quality in the persons for or against whom the claim is made. 2 Bouvier, 465; 4 Mass., 245 " *Benz v. Hines and Tarr,* 3 Kan 390,397 (1866)

The subject matter in this case is the Kansas recusal statutes being unconstitutional and the state judge violating 28 U. S. C. Sec. 455(a), this subject matter was not brought up in *Weaver I.,* thereby *res judicata* does not apply. (see appendixes F and G)

How does the Supreme Court of the United States define *res judicata* ? Quoting Mr. Justice Lamar.

"It is well settled that, in order to render a matter res adjudicata, there must be a concurrence of the four conditions, viz; *(1) Identity in the thing being sued for; (2) Identity of the cause of action; (3) Identity of persons and parties to the action; and (4) Identity of the quality in the person* for or against whom the claim is made. 2 Bouv. 467 ." *Lyon v. Perin Manufacturing Co.* 125 U. S. 698, 700 (1887)

The identity of what is being "sued for" in this case before the Court is "the federal standard of judicial impartiality"

that was not raised in *Weaver I* and thereby *res judicata* does not apply. (see appendixes F and G)

What about issues that might of been raised? Quoting Mr. Justice Douglas.

> "The governing principle is stated in *Cromwell v. County of Sac.*, 94 U. S. 351, 352-353. A judgment is an absolute bar to a susequent action on the same claim.
>
> But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matter in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point of question actually litigated and determined. Only upon such matters is the judgment conclusive in another action." *U. S. v. International Building Co.*, 345 U. S. 502,504,505 (1952)

The issue of Kansas recusal statutes being unconstitutional and the state judge violating a federal statute had never been controverted, litigated or determined, *res judicata* does not apply in this case !!! (see appendixes F and G)

The improper judicial conduct of the trial court was raised in *Weaver I*, however the point of Kansas recusal statutes being unconstitutional and the point of the state judge violating a federal statute had not been raised before, according to the

syllabus by the court in paragraph 2 of *Henry v. Railway,* 83 Kan. 104 (1910)the issue can be considered by the court when presented on the second appeal.

> "*Point in the Record of First Appeal Not Considered ----Determination on Second Appeal.* If the point, though involved in the record of a first appeal, is not brought to the attention of nor considered by the court, its decision then made does not preclude the consideration and determination of the point when presented on the second appeal." *Id.* at 104

In *Henry* it makes a difference if the freight depot was open on Sunday, however in this case it doesn't make a difference to the Court of Appeals of the State of Kansas if the United States Constitution violated !!!

In regard to issues being raised on the second appeal the Supreme Court of the United States has stated the following.

Quoting Mr. Justice Field.

> "Previous adjudications upon other points do not operate as an estoppel against the parties in the new cases, nor conclude the court, upon the consitutionality of its acts, because the point might have been raised and determined in the first instance. So when, in the present case the point was taken for the first time against the constitutionality of the act of 1868, the court was not precluded by the previous decisions from freely considering and determing it." *Boyd v. Alabama,* 94 U. S. 645, 648 (1876)

Quoting Mr. Justice McKenna.

> "In support of the second ground it is pointed out

> that the judgment of which the writ of error is directed was rendered on a second appeal and that the court decided that the decision "on the first appeal is the law of the case." It is hence asserted that is was *res judicata* and precluded dispute, and that, therefore, the decision rested upon an independent ground not involving a federal question and broad enough to maintain the judgment. For this *Northern Pacific R. R. Co. v. Ellis,* 144 U. S. 458, 464 is cited. That case does not determine this one. That case was constrained by the law of the State; such constraint does not exist in the present case. The constitutional question involved was considered and decided. The prior ruling may have been followed as the law of the case but there is a difference between such adherence and *res judicata*; one directs discretion, the other supersedes it and compels judgment. In other words, in one it is a question of power, in the other of submission." *Southern Ry. Co. v. Clift,* 260 U. S. 316, 319 (1897)

What occured in this case is explained in the following example. If the trial court said to the petitioner "because of your gender, race and religion I don't like you and I'm going to hammer you in this settlement." Then the petitoner appealed and stated. "How can I get a fair trial if the judge doesn't like me and he violated state judicial canons with his behavior, and the judge made a mistake on some forms. The Court of Appeals says no his statement of disliking you is ok but you are correct on the forms. The petitioner ask the Supreme Court of Kansas to review and says isn't this a violation of the due process clause of the 14th Ammendment of the United States ? The Supreme Court of Kansas denies review. The case goes back to the trial

court and the petitioner appeals saying the judge made a mistake on the forms and violated Title II of the Civil Rights Act of 1964 in the original trial, and the Kansas Civil Rights Act does not give the petitoner the same or greater protection as Title II of the Civil Rights Act of 1964. Oh and by the way the United States Constitution requires the judge to obey all laws passed by Congress !!! The Court of Appeals of Kansas rules *res judicata.* !!! Which makes sense because when it comes to judicial impartiality the supremacy clause and the United States Constitiution is not binding on judges in Kansas !!! {See *State v. Logan,* 9 Kan. App. 353,357,358 and *State v. Logan,* 236 Kan. 78,88 (1984)}

Futhermore the ruling of *res judicata,* is not absolute in Kansas. Quoting Mr. Justice Brewer.

> "Cases may arise in which it will be very clear that the first decision was erroneous, that not only in the case at bar will wrong result from adhering to the decision, but also other interests through the state will be imperiled; hence we do not doubt the power of the court to reconsider and reverse a prior decision in the same case." *C.P.U.P. Rld. Co. v. Shoup.,* 28 Kan. 394, 395 (1882)

Quoting Mr. Justice Smith.

> "Counsel for defendant in error have invoked the rule *stare decisis,* and insist that the former decision must govern on the second appeal. This would come to us with more force if we were not now considering the same case with the same parties before the court. If an erroneous decision has been made, it ought to be corrected speedily, especially when it can be done before the litigation in which the error has been committed has terminated finally. We are fully satisfied that the rule of

the former case is shattered by the pressing weight of opposing authority, and that reason is against it." *Railway v. Merrill,* 65 Kan. 436, 451 (1902)

Quoting Mr. Justice Burch.

"An appellate court, on a second appeal of a case, will not ordinarily reexamine questions of law presented by the first appeal, but where the case was on the first appeal remanded generally for a new trial and the same questions are presented on the second trial, the appellate court is not bound to follow opinions on question of law presented on the first appeal and may reexamine and reverse its rulings on such questions, and should do so when the opinion first expressed is manifestly incorrect."

This is substantially the doctrine of *Central Branch U. P. Rld. Co. v. Shoup.,* supra, and the practice of this court has been to reverse its former decision in the same case and follow. . . "the law of the land," rather than "the law of the case," whenever an imperative legal necessity demanded." *Lorimer v. Fairchild,* 68 Kan. 328, 346 (1904)

This doctrine of "the law of the land" should be applied in this case.

Quoting Mr. Chief Justice Johnston.

"The appellant contends that as the testimony on which the judgment in question rests was exactly the same as upon the earlier trial the decision on the former appeal necessarily determines the result of this appeal and requires judgment in its favor. If it be assumed that no new elements were brought into the case on the second trial it does not follow that the former decision, right or wrong, is conclusively binding upon this appeal.

> Ordinarily a question considered and decided on the first appeal is deemed to be settled, and, except for very congent reasons involving palpable error, will not be reexamined on a second appeal. Some courts hold that decision, whether right or wrong, is conclusive in all subsequent appeals; but what is called the "law of the case" is not an inflexible rule which requires a court blindly to reiterate a rule of law that is clearly erroneous." *Henry v. Railway Co.,* 83 Kan. 104,107,108 (1910)
>
> "This being the well-established rule in our own state, it is unnecessary to consider or review the rulings of other states upon the binding force of an erroneous decision on a prior appeal. On the first appeal in this case no account was taken of the distinction between mere neglect of the carrier and its willful wrong in refusing to deliver the goods twenty-four hours before the occurrence of the flood."*Id.* at 109

The distinctions between *Weaver I* and *Weaver II* are of greater differences than neglect or willful wrong, the Court of Appeals of the State of Kansas was wrong in ruling *res judicata* and denied the petitioner due process.

The petitioner then petitioned the Supreme Court of Kansas

The Supreme Court of Kansas denied review.

Summary

The case involves, child custody, visitation, money, real estate, other property and the petitioner's United States Constitutional rights. The petitioner is seeking to have all orders set aside in this case and ultimately wants a new trial with a judge that is not calling the respondents attorney at night. This would give the petitioner the most important fundamental requirement of due process "a fair tribunal."

Quoting Justice Kennedy, with whom Justice Blackmun, Justice Stevens and Justice Souter join, concurring in the judgment.

> "When the prevailing standard of conduct imposed by the law for many of society's enterprises is reasonableness, it seems most inappropriate to say that a judge is subject to disqualification only if concerns about his or her predisposed state of mind, or other improper connections to the case, make a fair hearing impossible. That is too lenient a test when the integrity of the judicial system is at stake. Disputes arousing deep passions often come to the courtroom, and justice may appear imperfect to parties and their supporters disappointed by the outcome. This we cannot change. We can, howerver, enforce society's legitimate expectation that judges maintain, in fact and appearance, the conviction and discipline to resolve those disputes with detachment and impartiality.
>
> The standard that ought to be adopted for all allegations of an apparent fixed predisposition, extrajudicial or otherwise, follows from the statute itself: Disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality. If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified. Indeed, in such circumstances, I should think that any judge who understands the judicial office and oath would be the first to insist that another judge hear the case." (emphasis supplied) *Liteky v. U. S.*, 114 S. Ct. 1147, 1162 (1994)

The Supreme Court of the United States should also

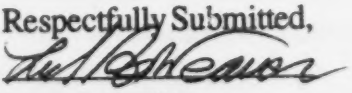
here this case because of the following major reasons, to determine if the Kansas Statues and Judicial Canons regarding judicial recusal are unconstitutional; to determine if the opinions of the Kansas Appellate Courts are in conflict with the Supreme Court of the United States, the United States Constitution, Federal Courts and other State Courts and to determine if 28 U. S. C. Sec. 455(a) applies to state judges.

The closing quote of this petition is from Mr. Justice Harlan.

> "Evidently it also needs to be repeated that the overriding responsibilty of the Court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist. This Court may not disregard the Constitution because an appeal in this case, as in others, has been made on the eve of execution. We must be deaf to all suggestions that a valid appeal to the Constitution, even by a guilty man, comes too late, because courts, including this Court, were not earlier able to enforce what the Constitution demands. The proponent before Court is not the petitioner but the Constitution of the United States." *Chessman v. Teets,* 354 U. S. 156,165 (1956)

For all the foregoing reasons, the Petitioner prays that the Court will grant his Petition for Certiorari.

Respectfully Submitted,



Lionel A. Weaver,
Petitioner, pro se
February 6th, 1997

Appendix A

NOT DESIGNATED FOR PULICATION

No. 74,377

IN THE COURT OF APPEALS

OF THE STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF

DENISE LEE WEAVER,

Appellee,

and

LIONEL A. WEAVER,

Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court,

JAMES W. BUSKA, judge.

Opinion filed September, 20, 1996. Affirmed.

Lionel A. Weaver, appellant pro se

Barry D. Martin, of Wallace, Saunders, Austin, Brown and Enochs, Chartered of Overland Park, for appellee.

Before ELLIOT, P.J., KNUDSON, J., and RICHARD M. SMITH, District Judge, assigned.

Per Curiam: Lionel A. Weaver appeals from the district court's order reducing his arrearage for temporary child support, which was entered on remand from a prior appeal. *In re Marriage of Weaver,* No. 70,810, unpublished opinion filed December 22, 1994 *(Weaver I).*

Weaver contends that the district court did not comply with the mandate of this court and engaged in improper judicial conduct that warranted recusal.

The issue of misconduct by the district court was raised by Weaver in the previous appeal and rejected. The issue is res judicata. See *Kansas Baptist Convention v. Mesa Operating Ltd. Partnership,* 258 Kan. 226 241, 898 P.2d 1131(1995) (citing

Coryell v. Hardy, 146 Kan. 522, 525, 72 P.2d 457[(1937)].

In *Weaver I,* this court reversed the district court's order of temporary child support and the calculated arrearage of $1,700 because the district court failed to comply with child support guidelines under Supreme Court Administrative Order No. 90 (1995 Kan. Ct. R. Annot. 83). Specifically, this court concluded that the amount of temporary spousal maintenance and child support ordered by the district court did not correspond to either party's child support worksheet. On remand, this court directed that the $4,021 figure, stipulated to by the parties as the amount of Weaver's gross monthly income, be used to recalculate the order for temporary child support.

Our standard of review is:

'[W]here, on appeal, a case has been reversed and remanded a trial court has no duty to perform except to spread the mandate of record and to proceed to have the judgment of the appellate court carried out. The [trial court] has no authority to consider other matters not contained in the mandate and its authority is restricted to the rendition of judgment as authorized by its terms. . . [W]hether a trial court has complied with the decision and mandate of the appellate court is purely a question of law. . . .'" 258 Kan at 231 (quoting W.K.H. Trust Co. v. Building Co., 160 Kan. 605, Syl. Sec.1, 609, 164 P.2d 143[1945]).

On remand, Weaver argued that the $4,021 gross monthly wage figure was unreasonable as it did not take into account the mortage payments that he was ordered to pay as part of the court's temporary orders. The district court stated that it had no authority to reduce Weaver's gross monthly wage, the amount of which was confirmed in *Weaver I.* The district court further ruled that the mortgage payments issue was res judicata as Weaver had failed to appeal from that order. The district court

then adopted Weaver's worksheet to recalculate the arrearage owed for temporary support.

The district court's determinations were consistent with the mandate in *Weaver I* and with the scope of its jurisdiction upon remand as expressed in *Kansas Baptist.* We find no error. Affirmed.

Appendix B

NOT DESIGNATED FOR PUBLICATION

No. 70,810

IN THE COURT OF APPEALS

OF THE STATE OF KANSAS

In the Matter of the Marriage of

DENISE LEE WEAVER, *Appellee*

and

LIONEL ALFRED WEAVER, *Appellant*

a/ k/ a LONNIE WEAVER,

MEMORANDUM OPINION

Appeal from Johnson District Court

JAMES W. BUSKA, judge.

Opinion filed December 22, 1994.

Affirmed in part, reversed in part, and remanded.

Lionel A. Weaver, appellant pro se.

Barry D. Martin, of Hackler, Hinkle, Corder, Martin & Hackler, Chartered, of Olathe, for the appellee.

Before GERON, P.J., LEWIS, J., and JOHN W. WHITE, District Judge, assigned.

Per Curiam: Appellant Lionel Weaver and appellee Denise Weaver were married in 1986. Three children were born to this marriage before it was dissolved in 1993. This action culminated in a termination of the marriage, division of property, and determination of custody and support of the children. Lionel appeals from nearly all of those decisions.

The facts of this action are not of particular importance. Suffice it to say, this was not a happy marriage. It appears that Lionel became entangled with another woman and fathered a child with her while still being married to Denise. Indeed,

Lionel apparently attempted to enter into a marriage with this third party at a time prior to his divore from Denise. There are various allegations concerning fitness for custody, etc., which need not be repeated at this point. The parties are well aware of the facts, and they will not be expanded unless that is necessary for an explanation of our decision.

Lionel raises some 15 separate issues in support of his theory that the trial court erred. While most of these issues are without merit, we conclude that the trial court erred in awarding temporary child support without complying with the child support guidelines, and we reverse and remand on that issue.

TEMPORARY CHILD SUPPORT

Lionel argues that the trial court abused its discretion in its award of temporary child support and maintenance.

The record is somewhat confusing on this issue. However, initially the trial court awarded the sum of $5,423 per month as temporary child support and maintenance. Lionel filed a motion to modify this award, and it was later reduced to $1,700 per month.

There were at least three hearings on the question of the proper amount to be awarded as temporary maintenance. Both Lionel and Denise filed child support worksheets. The trial court's order of temporary child support and maintenance is not consistent with either worksheet. Denise suggested that Lionel's gross monthly income was $6,468, while Lionel represented it to be $4,021. Denise ultimately stipulated to the figure submitted by Lionel.

The income figures represented to be acurate by each party were so wildly disparate, and the issue of temporary child support and maintenance so hotly contested, that at one point the trial court noted, "[I]f all these things are true, he has been ordered to pay too much. . . . If this is true, we're really putting,

putting it to him."

The problem with the temporary orders as we view it is that these orders were not issued in compliance with the child support guidelines.

We note that Denise's counsel stipulated to the amount of gross income attributable to Lionel as being $4,021, the amount shown on his domestic relations affidavit. Despite this stipulation, the trial court refused to reduce the temporary child support and maintenance award of $1,700. In addition, while the trial court acknowledged that the Kansas Child Support Guidelines (Supreme Court Administrative Order No. 83 [1993 Kan. Ct. R. Annot. 71]) require child support to be calculated after maintenance is awarded, it made no findings regarding adjustments to the child support order after maintenance had been determined.

Our standard of review on this issue is one of abuse of discretion. "'Judicial discretion is abused when action is arbitrary, fanciful, or unreasonable, which is another way of saying discreation is abused when no reasonable person would take the view adopted by the trial court.'" *In re Marriage of McNeely,* 15 Kan. App.2d 762, 768, 815 P.2d 1125, *rev. denied* 249 Kan. 776 (1991). The temporary child support order in this action was entered without complying with child support guidelines. We have consistently held that a child support order entered without complying with child support guidelines is an abuse of discretion. *In re Marriage of Emerson,* 18 Kan. App. 2d 277, 278, 850 P.2d 942 (1993)

We see no difference between child support calculated as a temporary order and child support calculated as the final order of the trial court. In each instance, the guidelines must be followed in computing the award. Since the guidelines were not followed in this particular action, it follows that the award of

temporary child support was an abuse of discretion by the trial court.

In the instant matter, the trial court awarded Denise a judgment in the amount of $9,036.07, representing Lionel's arrearage in payment of the temporary maintenance and child support. In view of our conclusion that the trial court abused its discretion in making the award of temporary child support, the judgment for arrearages must be recalculated.

On remand, we direct the trial court to recalculate the amount of temporary child support based on the child support guidelines. Since Denise's counsel has stipulated Lionel's gross monthly income of $4,021, this is the amount which should be used in recalculating the order for temporary child support. Based on the guidelines worksheet submitted by Lionel, his temporary monthly child support and maintenance would have been approximately $1,475. Assuming this amount to be correct, the difference between the $1,700 ordered and the appropriate amount of $1,475 is $225 per month. Over the nine-month pendency of the action, this amounts to a difference of $2,025. Thus, we require that Lionel's arrearages for temporary support and maintenance be reduced accordingly.

The figures we have suggested above are illustrative only. We do not suggest that they are correct nor that the trial court should rely on those calculations in its order on remand. On remand, the trial court is required to recalculate the proper temporary child support and use the child support guidelines in doing so. In making its calculation, the trial court should first calculate the amount of temporary maintenance and then calculate the proper amount of temporary child support under the guidelines.

FURTHER WORKSHEET ISSUES

Lionel next argues that the trial court erred by using the

child support worksheet submitted by Denise. Lionel appears to argue that Denise testified to a salary of $22,000 annually, which is not reflected on her worksheet. We have read the record, and it does not support Lionel's allegation. The salary to which Denise testified was earned prior to her meeting Lionel in 1986. According to Denise, since marrying Lionel, she has not worked except as a homemaker. The trial court did not err in accepting figures provided on Denise's child support worksheet.

Lionel further argues that the trial court erred in not making a multiple family adjustment It develops that Lionel has fathered six children by three women and has support obligations to all six children. Lionel's problem, however, is that none of the children from the other marriages reside with Lionel. Our reading of the guidelines indicates that the multiple-family adjustment is used only where the noncustodial parent has legal financial responsibility for the support of other children who reside with the noncustodial parent. Those facts are not present here, and no adjustment was necessary.

DUE DATE OF FIRST SUPPORT AND MAINTENANCE PAYMENTS

The trial court ordered Lionel's first support payment to be due and payable on August 15, 1993. Lionel argues that this was error. He suggest that because the temporary maintenance was due on the first day of the month, he was charged with a full month of temporary maintenance for August 1993 and that his decreed support came due on August 15. Lionel appears to be concerned that he was being double-charged for the month of August. Aside from the fact that Lionel is in arrears on the temporary maintenance, his argument is without merit.

"Temporary alimony or support *pendente lite* is an allowance by the court for the maintenance of a spouse during the pendency of a matrimonial action. Such support entitlement

ceases when the divorce action terminates." *Dube v. Dube,* 15 Kan. App. 2d 511, Syl. Sec 1, 809 P. 2d 1245 (1991). Temporary maintenance awarded during the pendency of a divorce action is merged in the judgment and does not continue after the judgment. 15 Kan. App. 2d at 516.

According to the journal entry filed in this matter, Lionel is correct that his child support obligation commenced as of August 15, 1993. However, his maintenance obligation did not commence until September 1, 1993.

Lionel's temporary maintenance arrearage ceased to accumulate after the August 1993 installment was added.

The trial court did not err by making Lionel's first support and maintenance payments due on August 15, 1993.

NONEXISTENT TESTIMONY

The next argument is that certain testimony referred to in the "Petitioner's Conclusions of Law and Proposed Findings of Fact" was not given.

The proposed finding concerned testimony supposedly given by Sue Ise. The record indicates that Sue Ise did not testify. Even though there was a purported finding based on this nonexistent testimony, that finding does not appear in the trial court's journal entry. Althought the trial court adopted most of the petitioners proposed findings of fact, the trial court did not adopt the finding of fact based on the nonexistent testimony of Sue Ise.

Even assuming the trial court made a finding based on nonexisitent testimony, there is no showing that Lionel was prejudiced thereby. "Harmless error is error which does not prejudice the sustantial rights of a party. It affords no basis for a reversal of a judgment and must be disregarded." *Tamplin v. Star Lumber & Supply Co.,* 251 Kan. 300, Syl Sec. 3, 836 P.2d 1102 (1992). If there was an error concerning this nonexistent

testimony, it was, at best, harmless.

INTRINSIC FRAUD

Lionel argues that Denise's testimony was false and that is constituted intrinscic fraud.

On direct examination, Denise testified that Lionel gave her only $50 a week to live on. On cross-examination, Denise admitted that she cashed a series of checks from Lionel to her, ususally in the amount of $120, commencing on September 11, 1992.

We do not consider this testimony to be perjury. The testimony of Denise was certainly contradictory. As best as we can discern from our examinantion of the record, Denise testified that Lionel took the checkbook from her in August 1992. On one occasion, he gave her $50 to last for one week. Thereafter, he began to give her checks in the amount of $120 per week. We see no perjury in this testimony, and Lionel does not suggest he was prejudiced in anyway by the testimony. There is no merit in Lionel's argument in this regard.

HEALTH INSURANCE

Lionel next argues that the trial court was unfair in ordering him to pay for health insurance for the children.

We have examined the record in the instant matter, and we see nothing unfair or improper concerning the trial court's decisions on who was to maintain health insurance for the children. The trial court is required under K.S.A. 1993 Supp. 60-1610(a) to make provisions for the support and education of the minor children. It was not error, based upon this record, for the trial court to order Lionel to maintain health insurance on the children. Lionel has offered nothing to indicate that the order was an abuse of the trial court's discretion.

PRETRIAL CONFERENCE

One of the many vigorously contested issues in this

lawsuit was who owned the stock in the L. A. Weaver Co., Inc. Denise argued that Lionel owned 50 percent of that stock. Lionel countered by denying any interest in the stock. The trial court concluded that Lionel owned 50 percent of the stock in the L. A. Weaver Co., Inc. We have examined the record, and this finding of fact by the trial court is supported by substantial competent evidence. Lionel argues that the trial court erred in not holding a pretrial conference to resolve this issue and other issues concerning the ownership of assets by the parties. While it might have been the best practice for the trial court to have held a pretrial conference, we are not prepared to say that this is failure to do so is reversible error. In view of the fact that the trial court's ultimate decision concerning the ownership of stock in the L. A. Weaver Co., Inc., was supported by substantial competent evidence, we conclude that there is no reversible error in the trial courts failure to hold a pretrial conference.

DIVISION OF PROPERTY

Lionel argues that the trial court abused its discretion in dividing the assets of the parties.

District courts possess broad discretion regarding the division of property in divorce cases. K.S.A. 1993 Supp. 60-1610(b); *In re Marriage of Sadecki*, 250 Kan. 5,8, 825 P.2d 108 (1992). The division of property is to be "just and reasonable." K.S.A. 1993 Supp. 60-1610(b). Property division need not be equal to be just and reasonable. 250 Kan. at 8-9.

Our standard of review on a question of division of property is abuse of discretion. There is no abuse of discretion if reasonable persons could differ as to the propriety of the action taken by the trial court. 250 Kan. at 8.

Our standard of review is such that we are required to affirm the trial court's order of division of property in the instant matter. We will not discuss the various sub-issues raised by

Lionel concerning valuation of assets. The bottom line is that the trial court's property division awarded Denise a net of $10,894 in assets and Lionel a net $9,257 in assets. We find no abuse of discretion in the trial court's action in dividing the parties' asssets.

L. A. WEAVER COMPANY, INC.

Earlier in this opinion, we alluded to the question of who owned the stock in L. A. Weaver Company, Inc. As we have indicated, we believe the trial court's decision that the company was owned at least 50 percent by Lionel was supported by substantial competent evidence. Lionel disagrees and argues that the trial court erred in concluding that he was a 50 percent owner of L. A. Weaver Company, Inc.

The fact is that federal income tax returns filed on behalf of the corporation listed as Lionel as a 50 percent owner. The corporation was formed in 1979; in 1988 Lionel was listed as a 50 percent shareholder of the corporation. Annual reports filed with the secretary of state for 1988 to 1991 listed Lionel as president, member of the board of directors, and 50 percent shareholder of the corporation.

An ammended annual report for 1991 deleted Lionel as president, director, and shareholder, and replaced him with his sister. The trail court concluded that this amended report, which was not filed until after the divorce action was filed, had no credibility and was submitted to disguise Lionel's ownership interest. We do not disagree with that finding and certainly conclude that it is supported by substantial compentent evidence.

We find no error in the trial court's conclusion that Lionel owned a 50 percent interest in the L. A. Weaver Company, Inc.

SALE OF RESIDENCE

The trial court awarded the residence of the parites to Denise. It then ordered the property sold. Lionel argues that

the trial court was without the power to order the residence to be sold because of the homestead exemption in the Kansas Constitution.

Lionel's argument has no merit. At the time the trial court ordered the residence sold, it had already awarded to Denise all the rights, title, and interest in the residence. Lionel had not interest in the residence at the time the sale was ordered and has no standing to assert homestead rights on appeal.

This issue is without merit.

VISITATION ORDERS

Lionel argues that the trial court erred in filing a journal entry which did not contain the exact words used by Denise in her proposed findings of fact and conclusions of law. He specifically objects to the omission of the words "very young" in describing the children. He also specifically object to the omission of the following language; "until such time as the children are older, at which time more liberal visitation should be considered."

This argument is without merit and frivolous. Lionel's attorney approved the journal entry without qualification or objection. There is no suggestion by Lionel as to how he was prejudiced by the wording of the journal entry. The trial court retains jurisdiction over the issue of visitation and did not err in the orders issued on that subject.

FURTHER VISITATION ISSUES

Lionel next suggest that the trial court abused its disretion in ordering that his visitation be at Denise's home in New York.

The standard of review for visitation issues is abuse of discretion. In re *Marriage of McNeely,* 15 Kan. App. 2d 762, 815 P.2 1125, *rev. denied* 249 Kan. 776 (1991). When substantial competent evidence supports the trial court's order, it will not

be disturbed on appeal. 15 Kan. App.2d at 764.

The evidence indicated that Denise did not trust Lionel as a parent. She testified that Lionel had left their three-year-old to sleep in the snow while sledding, which resulted in the three-year-old becoming ill. She also testified that she returned for trial from New York and found the family residence filthy, with roaches in the kitchen and bathrooms, mildew in the refrigerator, and four-foot high weeds in the yard. This testimony, coupled with Lionel's extramarital dalliance, creates some doubt as to Lionel's fitness as a parent.

Under the circumstances, we conclude that the trial court did not abuse its discretion in ordering Lionel to visit with the children at Denise's home in the state of New York. The trial court left open the possibility of extended visitation, recommending that the parties work out a visitation agreement when Denise had become satisfied that Lionel could and would take care of the children. We see no error in the court's order regarding Lionel's visitation with the children.

SOLE CUSTODY TO DENISE

Lionel next argues that the trial court abused its discretion in awarding sole custody to Denise.

Taking into consideration the testimony concerning Lionel's abilities as a father, we conclude the trial court's order was not an abuse of discretion.

Custody arrangements are to be made in the best interests of the children. K.S.A. 1993 Supp. 60-1610(a)(3). The trial court stated it did not award joint custody due to geographic distance, as Denise and the childred lived in New York. This geographic distance is surely a relevant factor to be considered by the trial court.

We conclude, after a review of the record, that the trial court did not abuse its discretion in awarding sole custody to

Denise.

IMPROPER JUDICIAL CONDUCT

Lionel argues in his final issue that the trial court engaged in improper judicial conduct.

During the trial, the judge commented on how he had to work at nights to work on motions. Denise's counsel responded by saying, "And I do know that you work at night on these things and we appreciate it. I've received phone calls from you as you were working at 10:00 o'clock at night on things."

Lionel wishes us to make the assumption that Denise's counsel's comments related to contact between Denise's counsel and the trial judge on the instant matter. However, there is absolutely no indication in this record that the contact mentioned by Denise's attorney occurred during the pendency of this action. In the absence of any support whatsoever in the record, we conclude that Lionel's issue of improper judicial conduct is totally without merit.

We affirm all decisions of the trial court with the exception of its decision on the amount of judgment to be awarded to Denise for arrearages in payment of temporary maintenance. We reverse that order and remand for reconsideration of temporary maintenance and child support in line with the Kansas Child Support Guidelines. On remand, the trial court is to recompute the proper amount to award as a judgment for arrearages in temporary maintenance and child support.

Affirmed in part, reversed in part, and remanded.

Appendix C

SUPREME COURT ORDER
NO. 93-70810-AS

DISTRICT CASE NO. 92C13644

IN THE SUPREME COURT
OF THE STATE OF KANSAS

IN THE MARRIAGE OF:
LIONEL ALFRED WEAVER,
APPELLANT
V.
DENISE LEE WEAVER,
APPELLEE

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING
ACTION TAKEN BY THE COURT:

PETITION FOR REVIEW BY APPELLANT,
LIONEL WEAVER.

CONSIDERED BY THE COURT AND DENIED.
DATE: 03/21/95.

CAROL G. GREEN
CLERK

Appendix D

SUPREME COURT ORDER
NO. 95-74377-AS

DISTRICT CASE NO. 92C13644

IN THE SUPREME COURT
OF THE STATE OF KANSAS

IN THE MARRIAGE OF:
DENISE LEE WEAVER,
APPELLEE
AND
LIONEL ALFRED WEAVER,
APPELLANT

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING
ACTION TAKEN BY THE COURT:

PETITION FOR REVIEW BY APPELLANT,
LIONEL WEAVER.

CONSIDERED BY THE COURT AND DENIED.
DATE: 11/08/96.

CAROL G. GREEN
CLERK

Appendix E
Questions presented to the Court of Appeals of the State of Kansas in *Weaver II*

From the Brief of the Appellant

A. Did the Trial court follow the directions of the Appellate Court?

B. By not disqualifying himself, did the Trial Court Violate Federal Statute 28 USCA 455(a)?

From the Reply Brief of the Appellant

I. Did the Trial Court disobey the Appellate Courts order regarding the arrearage in temporary child support ?

II. Should alleged ex parte communications between the opposing attorney an d Trial Judge be reason for a new trial, regardless of the time limits ?

III. (A) Did the Trial Court violate federal statute 28 U. S. C. Sec.455(a)?

(1)Are State Judges bound by U. S. C. Sec. 455(a) ?

(2)Do either the Kansas Statutes or the Kansas Judicial Conduct Canons provide the rights of the litigant with the same or greater assurance of judical impartiality as 28 U. S. C. Sec. 455 (a)

(3)What has the United States Supreme Court interpreted in situations where State and Federal governments legislate on the same subject ?

(4)Are State Judges bound by 28 U. S. C. Sec. 455 (a) ?

Appendix F

Questions presented to the Court of Appeals of the State of Kansas in *Weaver I.*

From the Brief of the Appellant

A.

1. Did the Trial Court abuse his discretion in setting temporary maintenance ?

2. Did the Trial Court abuse his discretion by awarding an arrearage that accumalated from the temporary maintenance orders ?

B. Did the Trial Court err by not using a child support worksheet in modifying the temporary maintenance and child support ?

C. After the divorce trial did the Trial Court err in accepting the Petitioners Child Support Worksheet with guideline maintenance ?

D. Did the Trial Court err in signing the journal entry decree of divorce in regards to using Administrative Order No. 75 & the first due date of Aug. 15, 1993

E. Did the Trial Court Err in adopting findings of fact from the Petitioner when the Petitioner's testimony constituted instrinsic fraud ?

F. Did the Trial Court Err in adopting findings of fact from the Petitioner when the Petitioner's testimony constituted instrinsic fraud ?

G. Does the divorce decree journal unfairly relieve the Petitioner's responsibility to provide health insurance for the children ?

H. Did the Trial Court err by not holding a pretrial to determine the assets ?

I. Did the Trial Court abuse its discretion in the division of property ?

J. did the Trial Court err in adopting the Petitioners finding of

Ownership of stock in the L. A . Weaver Co., Inc. ?

K.

1. Was the divorce decree journal requiring the residence to be placed on the market and sold unconstitutional ?

2. Was the Order for sell of Real Estate Unconstitutional ?

L. Did the Trial Court err in signing the journal entry decree of divorce in regards to visitation ?

M. Did the Trial Court Abuse its Discretion in granting sole custody ?

N. Did the Trial Court Abuse its Discretion in requiring the Respondents visitation to be in the Long Island, New York area?

O. Did improper and injudicial conduct occur ?

Appendix G

Questions presented to the Supreme Court of the State of Kansas in *Weaver I.* From the Appellants Petiton for Review of the Court of Appeals Decision

1. Did ex parte communications between the Trial Court and the Petitioner-Appellee's attorney Barry D. Martin violate the Respondent-Appellant's Constitutional Rights Guaranteed by the 14th Ammendment of the Constitution of the United States ?

2. Are judgements based upon testimony that were obstained elsewhere than in the evidence produced in the court, in violation of the Respondent-Appellant's rights guaranteed by the 14th Ammendment of the Constitution of the United States ?

Appendix H
Questions presented to the Supreme Court of the State of Kansas in *Weaver II.* From the Appellants Petition for Review of the Court of Appeals Decision

1. By not disqualifying himself, did the Trial Court violate federal statute 28 U.S.C. Sec. 455 (a) ?

A. Do either the Kansas Statutes or the Kansas Judicial Conduct Canons provide the appellant with the same or greater assurance of judicial impartiality as 28 U. S. C. Sec. 455 (a) if they do not then they are in violation of the United States Constitution.

B. Does the appellant have a United States Constitutional right to a fair and impartial trial that is equal to the federal standard of judicial impartiality?

2 The Decision of *Res Judicata.*

Supreme Court, U.S.
FILED
MAR 12 1997
OFFICE OF THE CLERK

No. 96-1253

In The

Supreme Court of the United States

October Term, 1996

LIONEL ALFRED WEAVER,

Petitioner,

vs.

DENISE LEE WEAVER,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Kansas

RESPONDENT'S BRIEF IN OPPOSITION

BARRY D. MARTIN
Counsel of Record
WALLACE, SAUNDERS, AUSTIN, BROWN & ENOCHS
Attorneys for Respondent
10111 West 87th Street
P.O. Box 12290
Overland Park, Kansas 66282
(913) 888-1000

70730
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21
Lutz Appellate Services, inc.

QUESTIONS PRESENTED FOR REVIEW

1. Whether 28 U.S.C. § 455(a) applies to state court judges.

2. Whether petitioner is barred from alleging lack of due process where he has refused to file a motion for change of judge, or to otherwise request the trial judge to recuse himself.

3. Is the Kansas statute regarding the procedure for change of judge, K.S.A. 20-311d, unconstitutional?

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the rules of this Court, respondent Denise Lee Weaver states that the only interested persons in this proceeding are those persons listed as parties to this proceeding and respondent's attorneys.

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The respondent, Denise Lee Weaver, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the order of the Supreme Court of the State of Kansas (Order No. 95-74377-AS, dated November 8, 1996).

STATEMENT OF THE CASE

Petitioner has previously filed five (5) appeals with the Court of Appeals of the State of Kansas and two (2) petitions for review with the Supreme Court of the State of Kansas.

Respondent respectfully opposes the petition for writ of certiorari, which distorts and misrepresents the truth, and is intended merely as harassment of respondent.

A. Course Of Proceedings And Disposition Of The Case Below.

This case was commenced November 30, 1992 with the filing of a Petition for Divorce. It was tried to the district court on August 12 and 13, 1993, and a Journal Entry of Decree of Divorce was entered November 30, 1993.

Petitioner was obviously unsatisfied with the judgment of the trial court and has elected to file multiple appeals. The one issue which petitioner continually raises is that the trial judge was bias or prejudiced against him, but has never stated why the trial judge would not be impartial. Neither petitioner nor his counsel have ever requested the trial judge to recuse himself, nor has there ever been a motion for change of judges filed.

Of the five (5) appeals to the Court of Appeals of the State of Kansas, petitioner has been totally unsuccessful, with the trial judge being affirmed on all issues, except a small issue of calculation of back maintenance, which the appeals court ordered to be recalculated.

The Supreme Court of the State of Kansas has denied review on two (2) prior occasions.

B. Correction Of Misstatements In The Petition.

Petitioner has misrepresented one fact throughout the multiple appeals, and that is that the trial judge and respondent's counsel had ex parte communications regarding the case. It is this allegation which petitioner continues to raise as grounds for a new trial.

Petitioner contends the trial judge and respondent's counsel had telephone conversations at night about the case (Petitioner's Petition for Writ of Certiorari, pps. 19-20). Of course, such telephone conversations never occurred.

The truth is that at the conclusion of the two (2) day trial, counsel for the parties wanted to know when a decision could be anticipated from the trial judge. The trial judge responded that the only time he had to work on decisions was at night, but that he intended to have a decision for the parties as soon as possible. Counsel for respondent then stated that he was aware the judge worked at night, as he had once received a telephone call from him at 10:00 at night *about a case.*

The case referred to was not this case; the telephone call had occurred many years earlier; and the sole purpose of the telephone call from the court on that occasion was to confirm a case had not been settled prior to the judge preparing an opinion and decision.

Again, this telephone call was unrelated to *Weaver,* and was merely an inquiry from the court regarding whether a case had settled. This is not grounds for showing bias or prejudice on the part of the trial judge.

The second material misrepresentation by the petitioner is his representation by implication that he has previously sought a change of judge.

At no time during the district court proceedings did petitioner or his counsel ever request a change of judge. Petitioner asserts he can obtain no relief, implying that he desires a different judge, but fails to mention that he and his counsel never filed a motion for change of judge.

Petitioner misleads this Court by arguing he can receive no relief under the Kansas procedure for change of judge (K.S.A. 20-311d), when in fact he has never sought such relief.

REASONS FOR DENYING THE WRIT

I.

28 U.S.C. § 455(a) DOES NOT APPLY TO STATE COURT JUDGES.

Petitioner argues that 28 U.S.C. § 455(a) applies to a district court judge for the State of Kansas. 28 U.S.C. § 455(a) states:

> **§ 455. Disqualification of justice, judge, or magistrate.**
>
> (a) Any justice, judge, or magistrate *of the United States* shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(Emphasis added).

As used in Title 28 "the term judge of the United States"

includes judges of the courts of appeals, district courts, court of international trade, and any court created by an Act of Congress, the judges of which are entitled to hold office during good behavior. 28 U.S.C. § 451.

The term "justice of the United States" includes the Chief Justice of the United States and the associate justices of the Supreme Court. 28 U.S.C. § 451.

Chapter 21 of Title 28 has no applicability to state courts. As stated in *Shaw v. Garrison,* 391 F. Supp. 1353 (E.D. La. 1975), *aff'd,* 545 F.2d 980 (5th Cir.), *rehearing denied,* 555 F.2d 1351 (5th Cir.), *reversed on other grounds,* 436 U.S. 584, 56 L. Ed. 2d 554, 98 S. Ct. 1991 (1977):

> As defined in 28 U.S.C. 451, "court of the United States" refers only to the Article III courts and certain federal courts created by Act of Congress. It does not include the various state courts.

Clearly, 28 U.S.C. § 455(a) has no applicability to state courts, and therefore is inapplicable to the case at point.

II.

PETITIONER IS BARRED FROM ALLEGING LACK OF DUE PROCESS WHERE HE HAS REFUSED TO FILE A MOTION FOR CHANGE OF JUDGE, OR TO OTHERWISE REQUEST THE TRIAL JUDGE TO RECUSE HIMSELF.

Petitioner argues that failure of the trial judge to recuse himself pursuant to 28 U.S.C. § 455(a) denied petitioner due process of law.

First, as stated above, 28 U.S.C. § 455(a) is not applicable to state courts. Secondly, petitioner has never requested the trial judge to recuse himself from the case.

Apparently, petitioner believes the judge is to read petitioner's mind and conclude "Oh, Mr. Weaver, you are accusing me of bias and prejudice, and want me to recuse myself." In fact, the only time petitioner has ever accused the trial court of bias and prejudice is in his appellate briefs.

The procedure for obtaining a change of judge is set forth in K.S.A. 20-311d, which states:

> **20-311d. Change of judge; procedure; grounds.**
>
> (a) If a party or a party's attorney believes that the judge to whom an action is assigned cannot afford that party a fair trial in the action, the party or attorney may file a motion for change of judge. The motion shall not state the grounds for the party's or attorney's belief. The judge shall promptly hear the motion informally upon reasonable notice to all parties who have appeared in the case. If the judge disqualifies the judge's self, the action shall be assigned to another judge by the administrative judge. If the judge refuses to disqualify the judge's self, the party seeking a change of judge may file the affidavit provided for in subsection (b). If an affidavit is to be filed it shall be filed forthwith.

(b) If a party or a party's attorney files an affidavit alleging any of the grounds specified in subsection (c), the administrative judge shall at once determine, or refer the affidavit to another district judge for prompt determination of the legal sufficiency of the affidavit. If the affidavit is filed in a district court in which there is no other judge who is qualified to hear the matter, the administrative judge shall at once notify the departmental justice for the district and request the appointment of another district judge to determine the legal sufficiency of the affidavit. If the affidavit is found to be legally sufficient, the case shall be assigned to another judge.

(c) Grounds which may be alleged as provided in subsection (b) for change of judge are that:

(1) The judge has been engaged as counsel in the action prior to the appointment or election as judge.

(2) The judge is otherwise interested in the action.

(3) The judge is related to either party to the action.

(4) The judge is a material witness in the action.

(5) The party or the party's attorney filing the affidavit has cause to believe and does believe that on account of the personal bias, prejudice, or interest of the judge such party cannot obtain a fair and impartial trial or fair and impartial enforcement of post-judgment remedies. Such affidavit shall state the facts and the reasons for the belief that bias, prejudice or an interest exists.

(d) In any affidavit filed pursuant to this section, the recital of previous rulings or decisions by the judge on legal issues or concerning the legal sufficiency of any prior affidavits filed by counsel for a party in any judicial proceeding, or filed by such counsel's law firm, pursuant to this section, shall not be deemed legally sufficient for any belief that bias or prejudice exists.

This statute is similar to 28 U.S.C. § 144, the federal procedure for change of a judge on grounds of bias or prejudice. The petitioner or his attorney need only file a motion for change of judge, and the judge shall promptly hear the motion informally. If the judge refuses to disqualify himself, the party seeking a change of judge may file an affidavit alleging grounds for a change of judge, and the administrative judge or another judge will determine the matter. If the affidavit is found legally sufficient, the case is assigned to another judge.

Petitioner has never filed the motion for change of judge. Had such a motion been filed, it might have been sustained. If the judge had denied the motion, petitioner could have filed the affidavit pursuant to K.S.A. 20-311d, and a change of judge would have been forthcoming had the affidavit been legally sufficient.

K.S.A. 20-311d does not contain a timeliness provision similar to the one found in 28 U.S.C. § 144, which inquires a "timely" affidavit. However, failure to ever file the required motion or affidavit constitutes waiver of the rights granted thereunder for a change of judge.

Petitioner, by his own inaction, has waived his right to a change of judge, and cannot now allege his due process rights were denied him because the judge failed to recuse himself. No allegation of bias or prejudice has ever been raised in this case at the district court level.

III.

THE KANSAS STATUTE FOR CHANGE OF JUDGE, K.S.A. 20-311d, IS CONSTITUTIONAL.

Most states have one of three statutory procedures for recusation for bias or prejudice. Those three types of procedures were discussed in *Hulme v. Woleslagel,* 208 Kan. 385, 493 P.2d 541 (1972), wherein the court stated:

> Some states require that the factual issues of prejudice be heard and determined before a judge is to be recused, that is, his actual prejudice must be proved in order to obtain his disqualification.

* * *

> The next group comprises those jurisdictions which require the filing of an affidavit of prejudice containing facts but without a hearing on the fact of prejudice. The affidavit must contain a general allegation of prejudice, plus factual statements supporting the charge of prejudice. . . . Representative of this group is the federal statute [28 U.S.C. § 144] which provides that when a party to a proceeding in district court files a timely and sufficient affidavit, . . . such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding. . . .
>
> * * *
>
> The third group of jurisdictions requires only the filing of an affidavit stating that the affiant believes he cannot obtain a fair trial because of the judge's bias or prejudice. . . . [F]iling of the affidavit itself disqualifies the judge and not the actual existence of circumstances which would in fact disqualify him.

(Pps. 388-389).

Kansas takes the middle ground, as in 28 U.S.C. § 144.

The Kansas statute, K.S.A. 20-311d, is similar to the federal procedure, 28 U.S.C. § 144. However, K.S.A. 20-311d requires that the administrative judge or another district court judge determine the legal sufficiency of the affidavit, not the judge against whom bias or prejudice is alleged.

28 U.S.C. § 144 and 28 U.S.C. § 455 use similar language,

and are intended to govern the same area of conduct, they have been construed *in pari materia,* and the test of the legal sufficiency of a motion for disqualification is the same under both statutes. *See In re Corrugated Container Antitrust Litigation,* 614 F.2d 958, 965 (5th Cir.), *cert. denied,* 449 U.S. 888, 101 S. Ct. 244, 66 L. Ed. 2d 714 (1980); *United States v. Carignan,* 600 F.2d 762, 764 (9th Cir. 1979); *Davis v. Board of School Commissioners of Mobile County,* 517 F.2d 1044 (5th Cir. 1975), *cert. denied,* 425 U.S. 944, 96 S. Ct. 1685, 48 L. Ed. 2d 188 (1976); *United States v. Kelly,* 712 F.2d 884, 889 (1983).

Section 144 and Section 455 of Title 28 pertain to the same subject matter and thing, and should be read together. Section 144 requires the filing of an affidavit, and Section 455, though self-executing, with no specific procedure set forth therein, is generally invoked by the filing of a motion.

The Kansas procedure is similar. The concerned party first files a motion with the district court asking the judge to recuse himself. If the judge fails to recuse himself, the party files the necessary affidavit, and that affidavit is reviewed by another judge to determine its legal sufficiency. If legally sufficient, a new judge is assigned the case.

In fact, the procedure is much fairer than the federal procedure because it requires the additional safeguard of review by another judge.

The constitutionality of Section 144 and Section 455 of Title 28 have never been challenged. The procedure set forth in K.S.A. 20-311d has never before been challenged as unconstitutional. K.S.A. 20-311d afforded petitioner a fair and impartial procedure to seek a change of judge, but petitioner refused or neglected to follow the same.

Contrary to what petitioner argues, a statute for recusal of a judge need not be self-executing to be constitutional, as evidenced by 28 U.S.C. § 144, which requires the filing of an affidavit, just like K.S.A. 20-311d.

CONCLUSION

For the reasons stated herein, writ of certiorari should be denied.

Respectfully submitted,

BARRY D. MARTIN
Counsel of Record
WALLACE, SAUNDERS, AUSTIN,
BROWN & ENOCHS
Attorneys for Respondent
10111 West 87th Street
P.O. Box 12290
Overland Park, Kansas 66282
(913) 888-1000